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No. 99-

IN THE

Supreme Court of the United States

YAHYA BICAKSIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended to impose multiple punishments on a single course of conduct that violated different provisions of the same subsection of 18 U.S.C. § 1958.

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided October 15, 1999 ..... 1a

Appendix B — Excerpt From Transcript Of The United States District Court For The Eastern District Of New York Dated October 2, 1998 .. 25a

Petitioner, Yahya Bicaksiz, herewith prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Second Judicial Circuit to review its judgment order of October 15, 1999, affirming a judgment of conviction and sentence of 215 months imprisonment.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed in an opinion dated October 15, 1999. It has not yet been published. A copy of that opinion is reproduced as Appendix A, commencing at 1a.

The opinion of the United States District Court for the Eastern District of New York was delivered from the bench on October 2, 1998. It is unpublished and annexed hereto as Appendix B, commencing at 25a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals of the Second Circuit was entered on October 15, 1999.

This Court has jurisdiction to review, through *certiorari*, the decision of the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1254(1).

Defendant-appellant Yahya Bicaksiz was indicted for two violations of 18 U.S.C. § 1958(a) by a grand jury sitting in the Eastern District of New York. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

The matter was tried by a jury in the Eastern District of New York. Mr. Bicaksiz was found guilty on May 26, 1998,

and sentenced on October 2, 1998. The conviction was entered on October 2, 1998.

A Notice of Appeal was timely filed on October 6, 1998, and amended on October 13, 1998.

Appellate review by the United States Court of Appeals for the Second Circuit is appropriate under Federal Rule of Appellate Procedure (F.R.A.P.) 4(b).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be . . . subject for the same offense to be twice out in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

This is a criminal case. The defendant, Yahya Bicaksiz, was arrested on February 20, 1998 on a criminal complaint, and was indicted for a substantive violation of 18 U.S.C. § 1958(a) and for conspiracy to violate said provision, on February 20, 1998. He was tried by a jury before the Hon. Nina Gershon, and found guilty on May 26, 1998. He was sentenced to a term of imprisonment of two hundred fifteen (215) months — one hundred twenty (120) months for conspiracy to commit murder and ninety-five (95) months on the substantive count of murder for hire.

He is currently serving his term of incarceration.

At the time of his arrest, Yahya Bicaksiz was a 61-year-old businessman with no prior criminal history. He came to the United States as a Turkish immigrant, became a citizen, worked hard, and eventually became the owner of a meat market in Nazareth, Pennsylvania and a Turkish restaurant in Union City, New Jersey. He resided in Pennsylvania.

On February 20, 1998, Mr. Bicaksiz was indicted on one count of conspiracy to travel in interstate commerce with the intention that a murder-for-hire be committed, and one count of traveling in interstate commerce with the intention that a murder be committed. The government alleged that Mr. Bicaksiz, who was going through a difficult divorce, had decided to murder his brother-in-law, one Osman Esen. The government posited various motives for the intended murder, including Mr. Bicaksiz's alleged desire to intimidate his wife into accepting a property settlement, and to punish his brother-in-law for siding with Mrs. Bicaksiz in the divorce.

The government alleged that Mr. Bicaksiz had requested his employee, one Zaour Kapaev, known as "Khazim," to arrange the details of the killing. Kapaev, who was tried jointly with Mr. Bicaksiz, enlisted the help of one Magomed Sadoulaev to find a killer. Mr. Sadoulaev, who became a government witness, then recruited one David Vayzer to do the killing. Vayzer backed out of the job, but recruited one Sergey Krutikov to take his place. Before Krutikov even obtained a weapon, however, Vayzer had a further attack of conscience and went to the authorities. Acting as a cooperating witness, Vayzer then taped a conversation with Sadoulaev, who was arrested. Sadoulaev, in turn, agreed to tape Mr. Bicaksiz. Ultimately, Messrs. Bicaksiz, Kapaev, and Krutikov were arrested and tried jointly.

Sadoulaev testified that Kapaev, telephoned him in January of 1998 and suggested that they meet. A few days later he met with Kapaev and Yahya Bicaksiz in Brooklyn around 8:30 p.m. Mr. Bicaksiz had driven into New York from Pennsylvania. Mr. Bicaksiz told Sadoulaev that he wanted to kill his brother-in-law and was willing to pay money to have this done.

Sadoulaev then enlisted a friend of his, David Vayzer, to do the killing. Sadoulaev then telephoned Kapaev and arranged a meeting with Mr. Bicaksiz in Paterson, New Jersey. The three met at a restaurant. Mr. Bicaksiz offered to pay $10,000 for the killing.

Sadoulaev then went back to Vayzer and communicated this exchange. Vayzer requested more money; he sought $15,000 with a $5,000 deposit. Vayzer also requested a photo and address of the intended victim. Sadoulaev spoke to Kapaev, who promised to pass Vayzer's requests to Mr. Bicaksiz.

Vayzer then had a change of heart about his personal involvement. He contacted an acquaintance, Sergey Krutikov, and enlisted him to do the killing.

The two then drove to Paterson, New Jersey to pick up the money, photograph, and address. Vayzer discharged Kruitkov and instructed him to wait, while he met with Sadoulaev and received the requested items. Vayzer was also given $5,000 in one hundred dollar bills. He returned to the car and told Krutikov that he had only been given $3,000.

Krutikov drove Vayzer to his apartment in Brooklyn. They arranged for Vayzer to find out about the remaining

money and then get in touch with Krutikov. Vayzer paid Krutikov $100 for the ride to Paterson and was dropped off around 11:00 p.m.

Shortly thereafter, on February 11, 1998, Vayzer approached a police car near his apartment on West 6th Street in Brooklyn and informed an officer that he had information about an intended murder. He showed the officer $4,900 in cash, a piece of paper, and a photograph. The officer accompanied him to the 62nd precinct where he spoke with a detective. Vayzer remained at the precinct all night until the arrival of FBI agents the next morning. When the FBI agents arrived, he gave them an account of a murder-for-hire plan. Vayzer then agreed to record conversations with the involved individuals. No charges were ever brought against Vayzer.

Sadoulaev then met with Vayzer at a diner on West 12th Street in Brooklyn. Vayzer was wearing a wire and taped the meeting. Several days later, Sadoulaev and Vayzer met for a second time. After taping that meeting, the FBI arrested Sadoulaev. He began cooperating.

On February 17, 1998, Sadoulaev made two telephone calls to Mr. Bicaksiz from the FBI office in New York. In the first call, Sadoulaev, in English, told Mr. Bicaksiz that he needed another photograph because "he" lost the photograph. Mr. Bicaksiz replied, in broken, nearly unintelligible English. In the second call, Sadoulaev again pushed for a photograph and also, for additional funds. Mr. Bicaksiz, again in broken English, was non-committal.

On February 20, 1998, Mr. Bicaksiz was arrested.

Following the verdict of guilty, Mr. Bicaksiz dismissed his prior counsel and retained new counsel.

On September 21, 1998, new counsel filed his objections to the Pre-Sentence Investigation Report (PSIR), noting that for sentencing purposes, the two counts of conviction merge, making the maximum sentence of imprisonment ten years.

Subsequently, the defense and the government conducted a furious fax campaign back and forth to the district court. The government argued that each offense of conviction was a distinct offense for which multiple punishments could be imposed. The defense argued that Congress never intended to impose multiple punishments for a single course of conduct that happened to violate different clauses of the same subsection of 18 U.S.C. § 1958.

On October 2, 1998, after a bitterly contested sentencing hearing, the trial court held that consecutive sentences were authorized by 18 U.S.C. § 3584(a). Mr. Bicaksiz was sentenced to a total term of 215 months, 120 months on count one and 95 months on count two.

This appeal followed.

REASONS FOR GRANTING THE WRIT

I.

WHETHER CONGRESS INTENDED TO IMPOSE MULTIPLE PUNISHMENTS FOR VIOLATION OF A SINGLE COURSE OF CONDUCT THAT VIOLATED DIFFERENT PROVISIONS OF THE SAME SUBSECTION OF 18 U.S.C. § 1958 IS AN UNSETTLED ISSUE AND *SUI GENERIS* BEFORE THIS COURT. IN PERMITTING CONSECUTIVE PUNISHMENTS, THE SECOND CIRCUIT DISREGARDED THE RULE OF LENITY.

Mr. Bicaksiz was convicted of traveling interstate with the intent to hire someone to commit murder, and conspiracy to commit murder-for-hire. The prosecution argued that the substantive offense was committed when Mr. Bicaksiz traveled from Pennsylvania to Brooklyn to ask Sadoulaev to commit murder, and that the conspiracy was committed when Sadoulaev said "yes." In imposing consecutive punishments, the trial court held that every violation of each prohibition listed in Section 1958(a) is a separate crime, for which multiple punishments may be imposed.

The issue of whether Congress intended to permit multiple punishments for murder conspiracies that involve both planned and actual travel across state lines was *sui generis* before the Second Circuit. Prior to its ruling, no court has taken up the question of whether the government can pyramid sentences by making the separate clauses of Section 1958 into separate crimes that permit separate punishment.

Section 1958 of Title 18 contains a single subsection, subsection (a), that enumerates in the alternative various ways in which the statute can be violated:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with the intent that a murder be committed . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both. . . .

18 U.S.C. § 1958(a) (1996).

A similar question has arisen with respect to Section 922(g) of Title 18, which criminalizes firearm possession by categories of persons specified in nine numbered subdivisions. Among those who may not possess firearms are felons, fugitives, drug addicts, the mentally ill, and aliens. 18 U.S.C. §§ 922(g)(1), (2), (3), (4) and (5). The enumeration of so many different categories of persons tempted prosecutors to attempt to double sentences upon those defendants unlucky enough to fall into more than one prohibited category. In a thoughtful series of decisions commencing with *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990), the Courts of Appeals for the Eleventh, Fifth, Tenth, and Fourth Circuits have all prohibited such multiple punishment. That analogous body of case law yields a number of principles that suggest the outcome here.

In *Winchester*, the defendant received consecutive sentences for being both a felon and a fugitive in possession of a firearm. 18 U.S.C. §§ 922(2)(1) and (2). The Eleventh Circuit noted that Section 922(g) did "not expressly indicate whether Congress intended to permit consecutive sentencing for the same incident under two subdivisions of section 922(g)." *Id.* at 606.

In *Winchester*, as here, the government argued that multiple punishments were clearly authorized by *Blockburger v. United States*, 284 U.S. 299 (1932), as each subdivision required proof of a fact that the other did not. The *Winchester* court held that *Blockburger* had no application when a defendant is sentenced under two subdivisions of the same section of the governing statute. *Blockburger*, by its own terms, applies to different statutes. *Id.* at 606.[1] The real question, whether Congress had intended to permit multiple punishments, could not be resolved by reference to *Blockburger*. *See also Sanabria v. United States*, 437 U.S. 54, 70 n.24, 98 S. Ct. 2170, 2182 n.24 (1978) (The *Blockburger* test is "used to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under *separate* statutes") (emphasis added).

In attempting to determine Congressional intent, the *Winchester* court emphasized the fact that Congress had provided penalties for the violation of 922(g), "but it did not list separate penalties for the separate subdivisions of subsection(g)." *Id.* at 605. Further, the purpose of the law

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1. The *Winchester* court noted that Blockburger himself was sentenced under sections 1 and 2 of the Harrison Narcotics Act. (*See Blockburger*, 284 U.S. at 303, 52 S. Ct. at 181.)

was to keep firearms out of the hands of persons Congress considered to be potentially dangerous and irresponsible; there was no indication that punishment was to be multiplied by the number of different statuses the defendant held. *Id.* at 606. And the legislative history was silent on consecutive sentences. *Id.* at 607. Thus, when Congress enacted Section 922(g), it was not "within Congress' comprehension or intention that a person could be sentenced, for a single incident, under more than one of the subdivisions of section 922(g)." *Id.* at 606.

The *Winchester* court also decried the "anomalous and draconian result" that could occur when a firearm was possessed by a man who happened to be a fugitive, mentally-defective, drug-addicted alien felon. Such a person could receive five separate and consecutive sentences for the same gun. *Id.* at 607.

Because there was no evidence of Congressional intent to multiply punishments, the *Winchester* court applied the rule of lenity, insuring that courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson v. United States*, 435 U.S. 6, 15, 98 S. Ct. 909 (1978).

The *Winchester* court discussed lenity at length:

> Lenity, the quality of being lenient or merciful, is an application of the common law principle that criminal statutes are to be strictly construed, a rule which "is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 35, 43, 5 L.Ed. 37 (1820). The

> rule "rests on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature." 3 N. Singer, Sutherland Statutory Construction, § 59.03 (4th ed. 1986). It is "an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Simpson* [*v. United States*], 435 U.S. [6], at 15-16, 98 S.Ct. [909] at 914 [1978].

916 F.2d at 607.

Following *Winchester*, the Fifth Circuit faced the same question in a case where an illegal alien and convicted felon had been sentenced to consecutive sentences for possession of the same firearm. In *United States v. Munoz-Romo (Munoz-Romo I)*, 947 F.2d 170 (5th Cir. 1991), the Fifth Circuit held that double punishments were authorized, applying the *Blockburger* test. *Id.* at 176. The defendant sought *certiorari*. In response to the petition, the Solicitor General confessed error and urged that one of the two counts be dismissed. The Supreme Court granted *certiorari*, and vacated the judgment "for further consideration in light of the position asserted by the Solicitor General. . . ." 506 U.S. 802, 113 S. Ct. 30 (1992).

On remand, the Fifth Circuit adopted the position of the *Winchester* court. *United States v. Munoz-Romo (Munoz-Romo II)*, 989 F.2d 757 (5th Cir. 1993). The Fifth Circuit also noted that Section 922(g) did not create "a case like *Blockburger*, where Congress criminalized different actions, in different statutes, at different times." *Id.* at 759. The *Munoz-Romo II* court emphasized that Congress had made changes to Section 922(g), adding to the list of offenders, "but has not changed the section's structure." Hence:

> Congress, by rooting all the offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon.

Id. at 759.

The Tenth Circuit, in *United States v. Johnson*, 130 F.3d 1420 (10th Cir. 1997), *cert. denied*, __ U.S. __, 119 S. Ct. 78 (1999) and the Fourth Circuit, in *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998) came to the same conclusion.[2]

Applying the wisdom of the *Winchester* line of cases to Section 1958 makes it clear that multiple punishments may not be imposed. First and foremost, there is no express indication that Congress intended to authorize separate punishments for conduct that violated more than one clause in Section 1958. As with Section 922(g), there is no listing of separate penalties for separate subsections. Indeed, the drafters of Section 1958 did not even include separate numbered subdivisions; the entire subsection is held together by commas, the use of the alternative ("or"), and semicolons. In the language of *Munoz-Romo II*, Congress "rooted" all of the offenses together in a single enactment and included all of the offenses as subsections — signaling that it did not intend to impose multiple punishments.

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2. In *United States v. Peterson*, 867 F.2d 1110, 1115 (8th Cir. 1989), *abrogated on other grounds*, *Horton v. California*, 496 U.S. 128 (1990), the Eighth Circuit, in conclusory fashion, held that separate convictions could be maintained for separate violations of subdivision of 922(g). The *Peterson* ruling, predating the Solicitor General's position, has not been reaffirmed in the Eighth Circuit.

As with Section 922(g), Section 1958 has been amended several times, without any change to its basic structure. The present Section 1958 began as P.L. 98-473, originally codified at Section 1952(A). 98 Stat. 2136. Section 1952(A) *did not* contain the "or who conspires to do so" language, or any other conspiracy provision. That language was added in 1994, by P.L. 103-322 § 140007, which increased penalties for all travel act crimes that involved actual violence, and added the words "or who conspires to do so" before the language "shall be fined." 108 Stat. 2033. Had Congress intended to authorize multiple punishments for the conspiracy and its object, it could have easily done so by creating a separate subsection with a separate punishment. Congress had the benefit of *Winchester*, *Munoz-Romo I* and *Munoz-Romo II*, and the Solicitor General's opinion. Instead, Congress deliberately inserted "or who conspires to do so" as an additional clause in the existent structure of Section 1958.[3]

The same "anomalous and draconian" result condemned in the *Winchester* line of cases occurred in this case. Mr. Bicaksiz's sentence was virtually doubled for engaging in

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3. Congress actually passed the same amendment to Section 1958 twice in 1994. In both P.L. 103-322, § 140007, and P.L. 103-322, § 320103, Congress twice added the "or who conspires to do so" language to Section 1958, in precisely the same place. 108 Stat. 2111. It was unclear what excess of zeal caused Congress to pass two laws that said exactly the same thing, but neither of them changed the structure of the statute or demonstrated any intent to punish separately the conspiracy and its object. On October 11, 1996, Congress enacted P.L. 104-294, § 601(g), aptly entitled, "Corrections Of Problems Arising From Uncoordinated Amendments," omitting one of the phrases "or who conspires to do so." P.L. 104-294, § 601(g)(3), 110 Stat. 3500.

travel that was, at best, incidental to the conspiracy. The court below found nothing amiss in assessing a ten-year penalty upon Mr. Bicaksiz for traveling from Pennsylvania to Brooklyn for the purpose of asking Mr. Sadoulaev to find a hit man, then imposing an additional ten-year penalty because Mr. Sadoulaev said "yes."

Taking this one step further, one can imagine a hapless hit man who travels from Canada through New York to New Jersey. He sends his intended Canadian victim a letter, who replies to the New Jersey address. The intended victim then drives down from Canada, through New York, into New Jersey. The defendant is then arrested. Under the trial court's anomalous and draconian view, the defendant has not committed one violation of Section 1958; he has committed eight.

The legislative history of P.L. 98-473 shows that Congress' purpose was to expand federal jurisdiction in murder-for-hire cases, particularly those that had an organized crime component. Congress was concerned that local law enforcement did not always have the resources to prosecute such cases. The then-existing law did not impose federal criminal liability for contract murders unless there was a drug, bribery, or gambling component. Senate Report No. 225, at 304-306. The prohibited acts described in Section 1958 are little more than jurisdictional hooks to permit the federal government to snare certain cases in which there is a federal (as opposed to purely local) interest.

There is no Senate Report for P.L. 103-322, § 140007. The conspiracy section appears to have been added as a result of the original drafters' oversight. It clearly comports with the overall statutory purpose of providing the federal

authorities the option of entering almost any murder-for-hire case. Certainly there is no evidence that Congress believed murder conspiracies were a separate and distinct problem warranting a separate and distinct law and punishment. To the contrary, Congress appeared to have recognized that most murders-for-hire would simultaneously involve conspiracies and substantive acts that would pull one of the jurisdictional triggers.

The Second Circuit rejected this analysis, relying on this Court's decision in *Callanan v. United States*, 364 U.S. 567 (1961), citing it for the proposition that Congress always intends multiple punishments for both a conspiracy and the underlying substantive offense, unless Congress makes a clear statement to the contrary. In *Callanan*, this Court upheld multiple punishments for a substantive Hobbs Act violation, as well as for conspiracy to violate the Hobbs Act. The Hobbs Act, codified at 18 U.S.C. § 1951 provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned nor more than twenty years, or both.

18 U.S.C. § 1951. On its face, the codified version of Section 1951 appears to be identical in structure to the enacted version of 18 U.S.C. § 1958, grouping all of the offenses into the same section of a single enactment.

The codified version of the Hobbs Act, however, fundamentally changed the structure of the Hobbs Act that was actually enacted by Congress.

The pertinent part of the Hobbs Act Amendments of 1946, 60 Stat. 420, from which the 1948 codification was compiled, were as follows:

> § 2. Whoever in any way obstructs, delays, or affects commerce, or the movement of commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> § 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Callanan, 364 U.S. at 588 n.1.

Thus, when Congress passed the Hobbs Act, it clearly signalled its intention to authorize multiple punishments by placing conspiracy in a separate section than the substantive offenses. *See United States v. Munoz-Romo (Munoz-Romo II)*, 989 F.2d 757 (5th Cir. 1993).

Congress did not follow a similar path with Section 1958. When Congress added "or who conspires to do so" to Section 1958, it did not do so by creating a separate section. 108 Stat. 2111. Rather, it simply inserted the conspiracy language as an additional clause, one of many different clauses, defining different ways in which the law could be violated. By amending Section 1958, but not changing its

basic structure, Congress signalled that it did not intend multiple punishments for violations of different clauses describing offense conduct. *Munoz-Romo II*, 989 F.2d at 759.

This basic difference in structure between the enacted version of 18 U.S.C. § 1951 and the enacted version of 18 U.S.C. § 1958 also answers the hypothetical issue raised *supra*:

> A hit man travels from Canada through New York to New Jersey. He sends his intended Canadian victim a letter, who replies to the New Jersey address. The intended victim then drives from Canada, into New York, and then into New Jersey.

Under the government's view of Section 1958, the hit man has committed eight separate crimes, for which eight consecutive ten-year sentences are authorized. Applying the government's logic to its erroneous construction of the Hobbs Act, a person who obstructs *and* delays *and* affects the movement of an article in commerce by extortion has committed three Hobbs Act violations, each carrying a separate penalty. Both results, of course, are absurd. Moreover, both results are foreclosed by the structure of the respective statutes.

Section 2 of the Hobbs Act Amendments of 1946 groups "obstruct," "delay" and "affect" into a single section of a single enactment, thereby clearly demonstrating Congressional intent to punish only once. The conspiracy provision, however, is set off in a different section, demonstrating a desire to cumulate punishments for conspiracy and the substantive offense.

Section 1958, by contrast, groups all of the offense conduct together into a single section, including the conspiracy provision. One who travels both interstate and internationally for the purpose of effecting a murder-for-hire is subject to only one punishment, even though crossing an international border is a different act than crossing an interstate border. Similarly, one who conspires to travel interstate for the purpose of committing a murder-for-hire, then crosses the state border for the same purpose, has committed one crime for which one punishment may be imposed.

There is no doubt that Congress could pass a statute that cumulated punishments for the conspiracy and substantive offense of interstate travel to commit murder for hire. Similarly, Congress could pass a statute that cumulated punishments for both interstate and international travel for the purpose of committing murder for hire. The Hobbs Act Amendments of 1946 provide a template for doing so. Congress simply did not enact such a law when it enacted 18 U.S.C. § 1958. At the very least, Congressional intent is sufficiently murky that the rule of lenity must be applied.

It may well be, as the Second Circuit held, that "the sentence and paragraph structure of a statutory amendment is not a Rosetta Stone of statutory construction . . . ." Appendix A, at 13a. However, such a structure remains a useful and important tool to ascertain Congressional intent. *Winchester*, 916 F.2d at 605. It is arguably more useful and realistic to begin with what Congress actually did than to assume, as did the Second Circuit, that the Congressional draftspersons of 1994 were dutifully cognizant of *Callanan* and their creation of a single subsection of violations was done with the conscious intent to have some violations of

one subordinate clause permit multiple punishments while violations of other subordinate clauses permit only single punishments. This is especially true when the Legislative history demonstrates that Congress and its drafters were so unaware and inattentive that they actually drafted and passed the same piece of identical legislation twice — then had to go back and pass new legislation to repeal one of the redundancies. The amount of deep, trenchant, jurisprudential scholarship that should be imputed to Congress in this area is questionable.

The Second Circuit began with the premise that because Congress could authorize consecutive punishments for a conspiracy and a substantive offense, the Second Circuit would find that Congress did so authorize, absent a clear expression to the contrary. Such reasoning precisely inverts the rule of lenity, and transforms it into a rule of harshness.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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